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SYED AHMAD JAMAL

v.

DATO BANDAR KUALA LUMPUR

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HIGH COURT MALAYA, KUALA LUMPUR
AZAHAR MOHAMED J
[CIVIL SUIT NO: D-21(IP)-35-2003]
12 AUGUST 2010

C ***COPYRIGHT:*** *Artistic works - Infringement - Moral rights - Whether a sculpture is artistic work protected under Copyright Act 1987 - Significant modification and distortion of plaintiff's sculpture without plaintiff's consent - Whether plaintiff's moral rights in sculpture infringed - Award of exemplary and aggravated damages for infringement of moral*
D *rights*

COPYRIGHT: *Infringement - Moral rights - Definition of moral rights - Right of paternity - Right of integrity - Removal of plinth containing plaintiff's name as sculptor - Whether moral right of plaintiff to be*
E *identified as author of sculpture infringed - Significant modification and distortion of plaintiff's sculpture without plaintiff's consent - Whether plaintiff's right of integrity in sculpture infringed - Statutory duty to seek consent of sculptor before modifying sculpture - Copyright Act 1987, s. 25(2)*

F The plaintiff is a highly respected and internationally well-known artist. Pursuant to a commission by UMBC Harta Sdn Bhd in 1985, the plaintiff designed and completed a sculpture entitled "Puncak Purnama" ('Lunar Peaks') and the surrounding landscape on a vacant government land. A unique plinth was constructed
G duly ascribing the authorship of the Lunar Peaks and the said surrounding landscape to the plaintiff. On 20 November 1986, Lunar Peaks and the surrounding landscape was presented to the defendant as a gift from UMBC to the residents of Kuala Lumpur. In 2000, the defendant carried out modifications to the Lunar
H Peaks and to the surrounding landscape without notifying the plaintiff or seeking his consent. The plinth was also removed. The plaintiff wrote to the defendant to state his objections against the defendant's modifications and demanded that the defendant forthwith restore Lunar Peaks and the surrounding landscape to
I its original condition. The plaintiff's demands were not complied with. Thus, the plaintiff filed this action claiming that the defendant had infringed his moral rights pursuant to s. 25(2) of the Copyright Act 1987 ('the Act').

Held:

(1) Moral rights under the Act focus on safeguarding of the author's integrity and reputation. The Lunar Peaks was a sculpture and hence, it was an artistic work protected under the Act. These moral rights are alienable rights and are exercisable during the subsistence of the copyright in the work and at the option of the author only, regardless of whether copyright is at the time of the complaint, vested in the author. Moral rights consist of the following: (i) the right to be identified as author (the right of paternity); and (ii) the right of integrity. (para 6)

(2) Section 25(2) of the Act prevents any person from presenting a work without identifying the author or under a name other than that of the author. Removal of the unique plinth by the defendant had resulted in failure to identify the plaintiff as the author of the works. Hence, the moral right of the plaintiff to be identified as the author of the works had been infringed by the defendant. (para 7)

(3) The modification made by the defendant had significantly altered the character and spirit of Lunar Peaks and had completely destroyed the delineation in form and the serenity intended by the plaintiff. Although the altered sculpture was based on the same form as testified by the plaintiff, the significant alterations had completely removed all the traces of the plaintiff's artistic work. The significant distortion, which amounted to derogatory treatment of the Lunar Peaks had adversely affected both the plaintiff's honour and reputation. (para 19)

(4) Although the defendant has a statutory duty and responsibility under the Local Government Act 1976 to maintain a public place but the defendant does not have a right to desecrate Lunar Peaks and the surrounding landscape without obtaining the plaintiff's consent. In carrying out one statutory duty, it does not mean that another statutory duty (in seeking consent) can be disregarded or ignored. There was a breach of statutory duty by the defendant. (para 22)

(5) The plaintiff had not led any evidence as to detail planning as to how the restoration works to be implemented and costs thereof. Thus, restoration relief was not an appropriate order. However, a declaration was granted in favour of the plaintiff that he would have an absolute right to recreate the Lunar Peak at any other place. (paras 24 & 25)

(6) Exemplary damages was awarded to the plaintiff in light of the oppressive and arbitrary conduct of the defendant. Aggravated damages was awarded to the plaintiff to compensate for injuries caused by the behaviour and conduct of the defendant to the plaintiff's feelings, dignity or reputation. Damages was thus awarded for infringement of the plaintiff's moral right in the sum of RM750,000. (paras 29 & 30)

Case(s) referred to:
Sehgal v. Union of India [2005] FSR 39 ***(refd)***

Legislation referred to:
Copyright Act 1987, s. 25(2), (4)

Other source(s) referred to:
David I Bainbridge, *Intellectual Property*, 7th edn, p 36
Khaw Lake Tee's Copyright Law in Malaysia, 3rd edn, pp 376, 377
Lionel Bently and Brad Sherman, *Intellectual Property Law*, 3rd edn, p 252

For the plaintiff - MK Lam; M/s V Chong W Lam
For the defendant - En Thangaraj; M/s Thangaraj & Assocs

Reported by Amutha Suppayah

JUDGMENT

Azahar Mohamed J:

[1] Dato' Syed Ahmad bin Jamal (the plaintiff) is a highly respected and internationally well-known artist. He is the only artist to date who has been recognized by the Malaysian government by the award of the National Laureate for his contribution in the field of art in 1996. He is one of the pioneer artists who has defined the local art scene and set new standards of creativity. He is also the former director of the National Art

Gallery. In 1996, he was also conferred the Panglima Jasa Negara for his outstanding contribution in the development of arts and culture of the nation. A

[2] Pursuant to a commission by UMBC Harta Sdn Bhd in 1985, the plaintiff designed and completed a sculpture entitled "Puncak Purnama" ("Lunar Peaks") and the surrounding landscape on a vacant government land in Jalan Sultan Mohamad near UMBC building Kuala Lumpur. A sculpture is a three-dimensional manifestation of an artist's vision and idea whether in abstract, figurative or morphological forms, geometric or organic, in a medium or a mixture of media consistent with the concept and nuances or creation and sometimes making use of the ambient space or artificial trappings. B C

[3] The plaintiff's towering public sculpture was made from luminous reinforced concrete clad with white "Pyroceram" slabs, had broad bases to suggest the nation's stability and steps to indicate the stages of continuous development in various direction of the nation; and comprised a circular reflecting pool with deep blue tiles to reflect the Lunar Peaks and the sky, together with fountains spurting fine sprays of water, creating a mist-like effect at the base of the Lunar Peaks. Its two right-angled triangles were meant to represent Gunung Ledang. The surrounding landscape, which consisted of the external landscape plaza contiguous with the said pool, played a supporting role by contrasting with the pristine whiteness of the sculpture, revealing a balanced harmony and heightening the sense of serenity created by the said sculpture. A unique plinth had been constructed duly ascribing the authorship of the Lunar Peaks and the said surrounding landscape to the plaintiff. On 20 November 1986, Lunar Peaks and the said surrounding landscape known as "Taman UMBC" was presented to Dato Bandar Kuala Lumpur (the defendant) as a gift from UMBC to the residents of Kuala Lumpur. D E F G

[4] In 2000, the defendant carried out modifications to the Lunar Peaks by replacing the "Pyroceram" slabs with stainless steel plates and fixing steel tubing along the perimeter of the sculpture, and replacing the deep blue tiles in the reflecting pool with black-coloured tiles without notifying the plaintiff or seeking H I

his consent. Further, the defendant similarly modified the said surrounding landscape by adding chequered black and white tiles to the external landscape plaza.

[5] On or about 15 August 2000, the plaintiff *via* his solicitors wrote to the defendant to state his objections against the defendant's modifications. On or about 10 June 2003, the plaintiff through his solicitors issued a demand to the defendant, *inter alia*, that the defendant within seven days from the date of that letter to give the plaintiff a written undertaking that it shall forthwith restore Lunar Peaks and the surrounding landscape to its original condition and to construct a similar plinth duly ascribing the plaintiff as the author of Lunar Peaks and the surrounding landscape within three months from the date of that letter under the plaintiff's control and supervision. The plaintiff's demands *vide* his solicitors' letter dated 10 June 2003 were not complied with.

[6] As a result, the plaintiff filed this action. The plaintiff's case is that the defendant has infringed his moral rights pursuant to s. 25(2) of the Copyright Act 1987 (the Act). Section 25(2) provides *inter alia* that no person may, without the consent of the author, do or authorise the doing the presentation of the copyrighted works without identifying the author; and the distortion, mutilation or other modification of the copyrighted works if the same significantly alters the work; and is such that it might reasonably be regarded as adversely affecting the author's honour or reputation. Moral rights under the Act focus on safeguarding of the author's integrity and reputation. It cannot be disputed that Lunar Peaks is a sculpture and hence, it is an artistic work protected under the Act. These moral rights are alienable rights are exercisable during the subsistence of the copyright in the work and at the option of the author only, regardless of whether copyright is at the time of the complaint, vested in the author (see: *Intellectual Property* by David I Bainbridge 7th edn, p. 36). In this way, the author may retain some form of control over his work even after his copyright in the work has been signed away (see: *Khaw Lake Tee's Copyright Law in Malaysia*, 3rd edn, pp. 376 and 377 and s. 25(4) of the Act). An author's created work is perceived as an extension of his intellectual and personality, and as such moral rights are the soul of his work (see: *Sehgal v. Union of India* [2005] FSR 39). Broadly stated, moral rights consist of the following:

(i) the right to be identified as author; and

(ii) the right of integrity.

[7] I shall now deal with each of these rights in turn. First the right to be identified as author: the right of paternity. In essence, this right provides the creator of works with the right to be identified as the author of the work. Section 25(2) of the Act prevents any person from presenting a work without identifying the author or under a name other than that of the author. In the present case, it is my findings that there was a unique plinth ascribing the authorship of the Lunar Peaks to the plaintiff when the works and the surrounding landscape were first completed in 1985. Encik Zain Azahari (PW2) gave evidence that he was the one who instructed the plinth to be built. Although he could not remember the exact words inscribed on the plinth but he stated that normally the name of the artist, in this case the plaintiff, will be inscribed on the plinth so to ascribe the authorship of the Lunar Peaks to him as well as the name of the sculpture and the date on which it was erected. Furthermore, the plaintiff's expert witness, Professor Dr. Dzul Haimi bin Md. Zain (PW5), has also testified that there was a plinth ascribing the authorship of the Lunar Peaks to the plaintiff. He added that typically, such acknowledgements would include the name of the artist, the title of the works, the year of execution, the media used and its dimension or measurement.

[8] During the modification works carried out by the defendant, the unique plinth was removed, and it has since failed to identify the plaintiff as the author of the works. Hence, the moral right of the plaintiff to be identified as the author of the works has been infringed by the defendant.

[9] From this point, I shall deal with the plaintiffs right of integrity. The right of integrity is the right to object to derogatory treatment of the work, or any part of it. The basis of this authorial prerogative is that the artist, through the act of creation, has embodied some element of his creation in the work, which ought to be protected from distortion or mutilation (see: *Intellectual Property Law* by Lionel Bently and Brad Sherman, 3rd edn, p. 252). Now, it is not disputed by the defendant that modification of Lunar Peaks has taken place. The modification consists of, among others:

A (i) the removal of "Pyroceram" slabs,

(ii) the use of stainless steel to cover the Lunar Peaks,

(iii) the fixing of steel tubing,

B (iv) the changing of tiles for the reflecting pool; and

(v) the changing to the black and white chequered tiles for the surrounding landscape.

C **[10]** With that the critical question arises: whether the modification of Lunar Peaks by the defendant amounts to the distortion or mutilation which significantly alters the work; and as such that it might reasonably be regarded to have adversely affected the plaintiff's honour or reputation.

D **[11]** The plaintiff has testified that UMBC had commissioned him to design a sculpture to reflect a Malaysian identity and the bank's image. According to the plaintiff, he has designed a sculpture which represented Gunung Ledang, the legendary mountain in Malay mythology. The plaintiff in his evidence explained:

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> Form, space, water and light are the elements of visual expression. The forms are juxtaposed to create relationship and interaction between positive and negative elements. The said sculpture is made of reinforced concrete clad with white "Pyroceram" slabs, and has broad bases to suggest the nation's
F stability and steps to indicate the stages of continuous development in various directions of the nation; and comprises a circular reflecting pool with deep blue tiles to reflect the Lunar Peaks and the sky, together with fountains spurting fine sprays of water, creating a mist-like effect at the base of the Lunar
G Peaks.

[12] The plaintiff has described in detail his intention when he originally designed the works:

> White is the expressive colour, countering the surrounding
H colours. The deep blue of the pool reflects sculpture and sky. The fine sprays of water create mist-like effect at the base of the mountain-form. The sculpture changes form, opening and closing as viewer moves around it. The surrounding landscape, which consists of the external landscape plaza contiguous with the said
I pool, plays a supporting role by contrasting with the pristine whiteness of the sculpture, revealing a balanced harmony and heightening the sense of serenity created by the said sculpture.

[13] The plaintiff, when asked how the modification has damaged his reputation and honour, answered as follows: A

> When I come to know about the modification carried out by the Defendant, I was very shocked and sad. I suffered sleepless nights, and embarrassment. My pride and reputation have been damaged because of the modification carried out by the Defendant. My friends have also asked me and commented about the modification to the said sculpture and its surrounding landscape. I was so sad until at one point I feel that I cannot go out and see the said sculpture and its surrounding landscape anymore because the Defendant has destroyed my works. B C
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> My proper feelings of dignity and pride as a well-known artist have been injured. I have also suffered disappointment, upset and frustration. Whatever the intention of the Defendant is, it is very unethical. This is an intrusion, an invasion, an imposed action with total disregard for the art object and for the artist. It is also a violation of the artist is right, demeaning, humiliating, disrespectful, insensitive and rude. Furthermore, the Defendant's lackadaisical attitude is handling the entire matter deeply insulted me. D
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> I have not created any more sculptures after the Defendant's modification of my Lunar Peaks. E

[14] The plaintiff's first expert witness is Mr. Ooi Kok Chuen (PW4). PW4 is a journalist, who has been writing on arts and culture for nearly 30 years. He has also written 50 books and catalogues on art. He has undertaken numerous specialized training in the field of arts and culture and has obtained certificates and degree in this particular field. He has had the privilege of curatorial guides of major art museums and galleries all over the world. He has seen Lunar Peaks prior to the modification by the defendant. This is his description of the original Lunar Peaks: F G

> Yes. Datuk Syed Ahmad's "twin" peaks entitled Lunar Peaks, is brilliantly conceptualised and executed, with two Gunungan triangles in contrapuntal ascending/descending steps and yin-yang harmony. It is inspired by his Gunung Ledang series which he has transformed onto canvas and songket with mesmeric results. I saw the sculpture when it was completed in 1986 and the numerous times I passed by the area. In the distance, one can sense the grace and the elegance, playing on form, light and H I

space. Closer up, its inherent rhythms and quiet dynamism become a delightful adventure. At night, the lightings transform the monumental sculpture amidst a fountain transformed the sculpture into a symbolic statement, with its fine lines and geometric illusions.

After the modification, this is what PW4 observed:

> It is a wilful defilement, desecration, an institutional vandalism committed by the very body, Bandaraya that should have done its level best to preserve the cultural heritage of the country.
>
> It shows the blatant arrogance of Bandaraya in not consulting such an eminent personage as Datuk Syed Ahmad Jamal - who is not only a leading pioneer artist and sculptor in the country, but has contributed tremendously in administration and education. He has also written several books on art.
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> Totally inexcusable and appalling.
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> I was stunned beyond words, flabbergasted and felt very, very sorry for the terrible crime, the murder of art.
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> What Bandaraya had done was to give the whole sculpture a stainless-steel cladding, which made it look horribly like kitchen sink. To make the sculpture more grotesque, the wannabe "sculptor" in Bandaraya erected a shoddy network of construction-like scaffolding all over the work.
>
> The proper procedure would be for Bandaraya to at least contact the artist to have whatever damaged or vandalised parts of the sculpture rectified, through negotiated arrangements, but no attempt has obviously been made to Datuk Syed Ahmad Jamal, who is a famous artist - he is the Seniman Negara, a former National Art Gallery director, a former director of the Specialist Teachers Training Institute, a former director of the Asian Cultural Centre. More recently, Datuk Syed Ahmad Jamal had the rare honour of a blockbuster exhibition on his life achievements which was officiated by the Yang di-Pertuan Agong, which to my memory and knowledge is the first such instance. The record 600-plus page accompanying book will vouch for Datuk Syed Ahmad's greatness and tremendous contributions.
>
> He was trained in sculpture when studying at the School of Art Institute in Chicago, besides having been trained in art at the Chelsea School of Art in England and in art history at the University of Hawaii in Honolulu.

> He is not only highly respected in Malaysia but also in the region and has been awarded the Asean Award for Visual Arts, the Australian Cultural Award, and the Alliance Francaise Award.
>
> He is a giant in Malaysian art.
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> Datuk Syed Ahmad Jamal has also done monumental sculptures in other parts of the Klang Valley like the one at Laman Asean in the Tugu Negara complex and the Allah stainless steel contraption at the Bangunan Dato Zainal, which had since been taken down. The moral rights and integrity of Datuk Syed Ahmad Jamal's work have been infringed and violated. The day Bandaraya committed the nefarious act was the day Malaysian Art died.

[15] Further, PW4 testified that after the modification, the Lunar Peaks has been deformed because the sculpture has become a completely new manifestation, a completely new life and a completely new character. PW4, under cross-examination, testified that his heart bleeds every time he passes by the altered sculpture because "it is ghastly", "such a deplorable thing, it looks like some kind of aluminium kitchen sink", "something of such great aesthetic beauty had transformed into such a monstrous concoction", a "transmogrification" and more importantly, he testified that any civilized and progressive society would have been appalled.

[16] The plaintiff's second expert witness is PW5. He is a professor, lecturing in the Faculty of Art and Design in Universiti Teknologi Mara. He has a Ph.D in History of Art from University of Edinburgh, United Kingdom. He has also seen Lunar Peaks prior to the modification by the defendant. This is his depiction of Lunar Peaks after the modification:

> In my opinion, the alteration made had destroyed the originality of the work. As such, it also destroyed an important historical piece in the development of Modern Malaysian Art.
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> It is no longer the "Lunar Peaks", (Year: 1986, measurement: 696 x 214.5 cm / 953 x 599 cm, media: concrete covered with pyroceram, collection: UMBC) of Syed Ahmad Jamal. It is an eye-sore to those who have seen the work before the alteration. The alteration reflects that whoever did it does not know art and in particular public sculpture. The alteration changed not only the material which is 'pyroceram' into steel/metal but also the whole design concept of the sculpture. The added steel structures are alien to the original design and the surrounding (which act as the

A "pedestal") too. The whole thing is pathetic. The aesthetic meaning of the artwork is totally lost. Such event reflects their insensitivity towards an artwork and the development of Modern Malaysian art and heritage. If we allow such an irresponsible act to our nation's heritage and, what more the work of our nation's art laureate, I think our country has failed in its efforts to preserve the nation's art and heritage.

[17] When cross-examined further by the learned Defence Counsel, PW5 explained:

C I disagree, with the way you asked me, because as I have said earlier that this is no longer a Lunar Peak. You can call it whatever you want to call it. This is no longer Lunar Peaks. Syed Ahmad Jamal is not there anymore. You see, when an artist produce an artwork, his soul is there, all right, when you destroy the whole thing, you destroy the man. When you change anything D on the piece of sculpture, you have already changed the whole art form.

[18] According to PW5, Lunar Peaks and its artist have been taught in art colleges in Malaysia. Lunar Peaks is part of the art E history of Malaysia. In this regard, PW5 explained:

Well, if you know Syed Ahmad Jamal, you will want to follow exactly how he creates his work, you know, this is another piece in a bigger form, besides his paintings, and his sketches and the models. This is a testimony of the artist in the Malaysian art F scene. You ask any artist, any sculpture, or any art students in the country, they will know Lunar Peaks. Because we teach them, it is in our curriculum. In Sekolah Seni, by the government. But in art colleges, you go to any universities now teaching art and design, they know Lunar Peaks, and not the Lunar Peaks today. The Lunar Peaks then, you see. In my class, when I show my G slides, my art history slides, I do not show the present one, I show the original, that is Lunar Peaks.

[19] Both PW4 and PW5 are qualified and experienced experts in this field. I have no reasons not to accept their enlightened H views. I also have the benefit of examining the plaintiff's work prior to the modification and after. In my view, the modification made by the defendant has not only significantly altered the character and spirit of Lunar Peaks but it has also completely destroyed the delineation in form and the serenity intended by the I plaintiff. Although the altered sculpture is based on the same form

as testified by the plaintiff under cross-examination, there is no doubt that the significant alterations had completely removed all the traces of the plaintiff's artistic work. The defendant admitted that he removed all the "Pyroceram" slabs on the Lunar Peaks by replacing them with stainless steel plates; fixed steel tubing along the perimeter of the sculpture; and replaced the deep blue tiles in the reflecting pool with black-coloured tiles without notifying the plaintiff or seeking his consent. Furthermore, the defendant similarly modified the surrounding landscape by adding chequered black and white tiles to the external landscape plaza. The pristine Lunar Peaks has been altered to the extent that it looks more like a "kitchen sink". Besides, the emphasis on the Lunar Peaks has been eroded by the black and white chequered plaza which is contiguous to the reflecting pool. In my judgment, the modification caused by the defendant on Lunar Peaks is so significant that it might be reasonably be regarded as adversely affecting the plaintiff's honour and reputation. In my judgment, anyone looking at the mutilated sculpture would have thought that the plaintiff has lost his distinctive style and would have been appalled at the altered sculpture. It is my findings therefore, the significant distortion, which amounts to derogatory treatment of the Lunar Peaks, has adversely affected both the plaintiff's honour and reputation.

[20] As to the learned counsel for the defendant's argument that as a matter of policy the defendant should not be held liable for the restoration works, I find that there is no merit in this argument. There is no legal basis for contending that the provision in question does not contemplate a work of art that has fallen into a state of disrepair. In my view, whether the moral rights of an artist has been infringed will depend on whether the distortion or mutilation of the work significantly alters the work, and is such that it might reasonably be regarded as adversely affecting the artist's honour or reputation.

[21] It was argued by learned counsel for that defendant that s. 25(2) of the Act should be interpreted in a manner that will produce a just and fair result. Nevertheless, I agree with the argument of learned counsel for the plaintiff that s. 25(2) of the Act does not create any problems with interpretation, rendering an unjust and unfair result. Courts are bound to give effect the true meaning of words of the legislation. Courts should not concern

A themselves with matters of policy which are the prerogative of the legislature. The role of the courts in construing the meaning of a statutory provision is to ascertain the meaning of the provision in its application to a particular factual situation. If the words of the legislation are precise and unambiguous, such as s. 25 of the Act, B they must be given its ordinary meaning. In this regard, there is no legal basis for the defendant to contend that his actions complained of in the present case are immunized by written law.

[22] Having regard to the factual situation and all the relevant C circumstances in the case at hand, I am unable to accept the defendant counsel's argument to the effect that the elements of the tort of breach of statutory duty are absent in this case so that it is not liable to the plaintiff. What is worth noticing is that the plaintiff's case is that the defendant has infringed his moral D rights, which is protected under s. 25(2) of the Act. The provision gives the plaintiff the right to claim authorship and to object to any distortion and mutilation which would be prejudicial to his honour and reputation. It is true that the defendant has a statutory duty and responsibility under the Local Government Act E 1976 to maintain a public place but the defendant does not have a right to desecrate Lunar Peaks and the surrounding landscape without obtaining the plaintiff's consent. In carrying out one statutory duty, it does not mean that another statutory duty (in seeking consent) can be disregarded or ignored. The provision F protects the sanctity of the artwork. It is the Parliament's intention to provide for moral rights. There are no provisions in the Copyright Act 1987 to the effect that public policy will negate its provisions. It is my findings that based on the evidence as discussed earlier, there is a breach of statutory duty by the G defendant.

[23] Now, I come to the reliefs. There have been very intensive submissions on relief no. 1 prayed by the plaintiff to the effect that the defendant within three months from the date of judgment at its own costs restores the plaintiff's said sculpture to its original H form under the supervision of the plaintiff.

[24] In the alternative, learned counsel argued that the plaintiff is seeking a declaration to restore the works himself instead of the defendant so restoring. Now, the plaintiff has not led any evidence I as to detail planning as to how the restoration works to be

implemented. On top of that, the plaintiff has led no evidence as to the costs of the restoration proposed by the plaintiff. This is an important consideration bearing in mind that public funds had been expended and utilized by the defendant when in 2000 the defendant carried out the modifications to the Lunar Peaks. In my view, the restoration relief is not an appropriate order in the circumstances of this case. In this context, I will however grant a declaration in favour of the plaintiff that he would have an absolute right to recreate the Lunar Peak at any other place.

[25] This brings me to the issue of damages. In this regard PW4 has testified that RM5 million as compensation is reasonable and fair as a punitive and exemplary one, and for denigrating and sullying the reputation of the plaintiff, who is not only considered a national treasure but he is also being highly regarded in the Asia-Pacific region as attested by the numerous regional awards given in his honour.

[26] In assessing damages, it is relevant to consider the conduct of the defendant. The plaintiff went to meet the defendant and the defendant's officers after he found out that the defendant has carried out modification to Lunar Peaks without notifying him or seeking his consent. DW4 dismissed the plaintiff summarily by telling him that it is too late and that nothing can be done since the contract has been awarded. On or about 15 August 2000, the plaintiff *via* his solicitors wrote to the defendant to state his objections against the defendant's modifications to his work and demanded that the defendant remove the stainless steel plates and steel tubing in order to restore the plaintiff's honour, integrity and reputation, which have thereby been adversely affected. Despite having notice of the plaintiff's objections, the defendant did not act upon the same. Although *via* the defendant's letter dated 6 September 2000, the defendant proposed to have a discussion with the plaintiff, which the plaintiff was willing to participate and have so informed the defendant, the said discussion did not materialize because the defendant did not fix any time or date for the said discussion. When the defendant was pressed to fix a time and date for the discussion, the defendant merely informed the plaintiff that he had to have a meeting with all the relevant departments before fixing the time and date for the said discussion. At the filing date of the writ, which is more than three years from the alleged meeting, the defendant has yet to fix any time or date for the said discussion. The plaintiff testified that:

A Even though DBKL claims that they were merely carrying out statutory duties and the works carried out were on the government land, it does not mean that DBKL can do whatever they want without taking into consideration the feelings and moral rights of the artist involved.

B **[27]** The plaintiff also met with the defendant in person (the then Datuk Bandar) twice and was given the assurance that since he is an old boy of the English College Johore Bahru something will be done to help the plaintiff. However, this is also to no avail.

C **[28]** I also need to consider the extent of the mutilation of Lunar Peaks in assessing damages. In this regard PW4 testified that:

This dastardly, demeaning act has never been done anywhere in the world. Yes, public sculptures have been vandalized, damaged or defiled, but these are all done by the low-life and miscreants, not the city fathers who ought to have been proud of the artistic creations that help give the city its beauty, its life, its face.

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The aesthetics, character and spirit, of the work have been totally changed, for the worse, and this is unforgivable and disgraceful.

E PW5 also testified that:

Such event reflects their insensitivity towards an artwork and the development of modern Malaysian art and heritage. If we allow such an irresponsible act to our nation's heritage and, what more the work of our nation's art laureate, I think our country has failed in its efforts to preserve the nation's art and heritage.

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Furthermore, in terms of education, it has also created confusion to our younger generation about the History of Modern Malaysian Art because the "Lunar Peaks" is no longer the same piece as documented in the literature. It is an important piece of public sculpture and is inter-related with other works produced by the artist. For example, "Growth" (1987, marble, in Laman ASEAN). Syed Ahmad Jamal has a distinctive style and is well documented. His style is rooted in the Malaysian culture. The alteration was so bad that in my opinion, no one with an art background (Malaysian Art) will ever believe that such work (after the alteration) was done by him. The elements and principle of art that built the composition and symbolism are entirely against the true spirit of the "Lunar Peaks".

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> Thus, it is an injustice done to the artist (they have destroyed Syed Ahmad Jamal's reputation as the nation's art laureate), the Malaysian public and the international audience, who follow the development of Modern Malaysian art since Merdeka. Above all, it is entirely wrong to make any kind of alteration without the consent of the artist.

[29] And the worst of it was when, tellingly, in utter arrogance, DW4 said he did not consider the plaintiff's Lunar Peaks, prior to the flagrant mutilation, as a work of art. This is a plain manifestation of philistinism and the lackadaisical mind-set. It says a lot about the lack of art understanding and awareness. As the custodian of Lunar Peaks, the defendant has the responsibility of ensuring the landmark artwork's original form is conserved for the public. That is why, it my view that exemplary damages should be awarded to the plaintiff since the oppressive and arbitrary conduct of the defendant ought to be taken into account. As stated earlier, PW4 said RM5 million as compensation is fair and reasonable. Still, after what I have already said about the oppressive and arbitrary conduct of the defendant, to my mind, damages in the sum of RM5 million is on the higher side. I am guided by the principle that damages are not limited to pecuniary losses and may include what are known as aggravated damages, that is, damages awarded to 'compensate' for injuries caused by the behaviour and conduct of the defendant to the plaintiff's feelings, dignity or reputation. As cases involving infringing of moral rights are concerned not so much with pecuniary as non-pecuniary loss as hurt feelings or mental distress, the award of aggravated damages for consolatory is more appropriate than compensatory damages.

[30] The plaintiff is highly respected as a world-class artist. His ideas and creativity are not only celebrated in our country but also on the world stage. The plaintiff is said to be synonymous with the history of modern Malaysian art. Having considered the totality of the evidence, in my view, damages for infringement of the plaintiff's moral right in the sum of RM750,000 is fair and reasonable. To sum up, I allow the plaintiff's claim against the defendant. Accordingly, I make an order in terms of prayers 3 ie, damages in the sum of RM750,000; 5 and 6 of the statement of claim. Further, I make a declaration in favour of the plaintiff that he would have a right to recreate Lunar Peak at any other place.